

RECEIVED FEB 10 2005

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No.

**05-B - 268 (CBS)**

UNITED STATES OF AMERICA,

Plaintiff,

v.

FREDERIC M. BERNSTEIN,  
HENRY Y. YUSEM,  
K&J PROPERTIES, INC.,  
Y&B PROPERTIES, INC.,  
INDIAN CREEK INVESTMENTS, LLC, and  
ICR, LLC,

Defendants.

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**CONSENT DECREE**

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WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the Complaint herein against Defendants Frederic M. Bernstein, Henry Y Yusem, K&J Properties, Inc., Y&B Properties, LLC, Indian Creek Investments, LLC, and ICR, LLC (collectively, "Defendants"), alleging, inter alia, that Defendants violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges two counts; the first of which asserts that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at a portion of

a development site northwest of the City of Loveland in Section 31, Township 6N, Range 69W, Larimer County, Colorado (hereinafter "Indian Creek Ranch Site"), without authorization by the United States Department of the Army ("the Corps"), more specifically described in the two Administrative Orders referenced below; the second of which asserts that Defendants Frederic M. Bernstein; Y&B Properties, Inc.; Indian Creek Investments, LLC; ICR, LLC; and K&J Properties, Inc. violated CWA Section 309 by failing to comply with two administrative orders of the EPA, docket numbers CWA-8-99-07 (Aug. 30, 1999) and CWA-8-2000-10 (May 11, 2000), regarding the Indiana Creek Ranch Site (hereinafter "Administrative Orders");

WHEREAS, the Complaint seeks, inter alia, (1) to enjoin the discharge of pollutants into waters of the United States at the Indian Creek Ranch Site in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and at the direction of EPA, to restore the damages caused by their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint and two Administrative Orders regarding the Indiana Creek Ranch Site;

WHEREAS, Defendants K&J Properties, Inc.; Y&B Properties, Inc.; and Indian Creek Investments, LLC are debtors in the jointly administered bankruptcy cases pending in the United States Bankruptcy Court for the District of Colorado and denoted as Case No. 02-26975 ABC. Daniel A. Hepner has been appointed Chapter 11 Trustee (hereinafter "the Trustee") in such

bankruptcy cases and has filed a plan of reorganization for the debtors which proposes that he will continue to serve as a liquidating trustee post-confirmation for K&J Properties, Inc.

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

#### I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Colorado pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct or have conducted business in this District, the subject property is located in this District, and the cause of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

## II. APPLICABILITY

4. Except as provided in the following paragraph relative to the Trustee in his personal capacity, the obligations of this Consent Decree shall apply to and be binding upon Defendants, their officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Defendants whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against one or more Defendants, no Defendant shall raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions hereof.

5. Notwithstanding the foregoing, it is agreed by all parties hereto that the Trustee, and successor trustees (whether serving as Chapter 11 Trustee or as a post-confirmation trustee for some or all of the non-individual defendants), shall have no personal liability of any nature under this Consent Decree or CWA matters addressed in this Consent Decree.

## III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint and the Administrative Orders against the Defendants under CWA Section 301 concerning the Sites.

7. Defendants' obligations to implement the "Sediment Removal and Restoration Plan," as defined in paragraph 20 below, are subject to and contingent upon obtaining access from the owners of the areas to be restored under that plan, provided that Defendants shall make all reasonable and best efforts to secure access from the owners. "All reasonable and best efforts" shall include, but is not limited to, Defendants being amenable, if asked by any owner, to a hold-harmless, obtain insurance, or other similar instrument specifying, for example, that Defendants are responsible for their contractors and will repair any damage they cause to areas to be restored while implementing the "Sediment Removal and Restoration Plan"; and Defendants' notifying EPA and the United States Department of Justice promptly if any owner objects to granting access. As of the date of this Consent Decree, Defendants represent that a representative of one of them has spoken with all owners of the parcels where the restoration work will occur, and that the owners have indicated a willingness to grant access.

8. Defendants' obligations under this Consent Decree are joint and several.

9. Except as in accordance with this Consent Decree, Defendants Frederic M. Bernstein; Henry Y. Yusem; and ICR, LLC, and those Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations. Except as in accordance with this Consent Decree, Defendants K&J Properties, Inc.; Y&B Properties, Inc.; and Indian Creek Investments, LLC, and those Defendants' agents, successors and assigns under the Bankruptcy Reorganization Plan are enjoined from discharging any pollutant into waters of

the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

10. The parties acknowledge that Nationwide Permit 32, found at 67 Fed. Reg. 2020, 2084 (Jan. 15, 2002), authorizes any fill that was placed as of April 13, 2000, in the areas identified in Appendix A (as amended by Appendix B) to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 (67 Fed. Reg. 2020) authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

11. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

12. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit, except as provided in Paragraph 10 above.

13. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

14. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

15. With the exception of paragraphs 1 through 3 above, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

#### IV. SPECIFIC PROVISIONS

##### CIVIL PENALTIES

16. Defendants shall pay a civil penalty to the United States in the amount of One Hundred Ten Thousand Dollars (\$110,000). Defendants shall make the above-referenced payment within ten (10) days after either entry of this Consent Decree or the effective date of the Bankruptcy Court of approved Chapter 11 Plan in In re: K&J Properties, Inc. (EIN 58-2400029), Case No. 02-26975-ABC (and consolidated cases), whichever event is later.

17. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2004V00991, EPA Region 8 and the DOJ case number 90-5-1-1-16840. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Colorado. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

18. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section IX of this Consent Decree, that such payment was made in accordance with Paragraph 17.

19. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VIII) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

#### SEDIMENT REMOVAL, WETLAND RESTORATION, AND CHANNEL STABILIZATION

20. Defendants shall implement the "Sediment Removal and Restoration Plan" (Appendix A hereto), as amended by Appendices B and C hereto. References herein to the Sediment Removal and Restoration Plan should be read to include the amendments referenced in this paragraph (that is, Appendices B and C).

21. Upon completion of implementation of the Sediment Removal and Restoration Plan, Defendants shall comply with the requirements of the CWA at any restoration location identified in the Sediment Removal and Restoration Plan.

22. Defendants shall, within fifteen (15) days of entry of this Consent Decree, record a certified copy of this Consent Decree with the clerk and recorder in Larimer County. Defendants may likewise record a termination of this Consent Decree following Court approval.

#### V. NOTICES AND OTHER SUBMISSIONS

23. Within 30 days after the deadline for completing any task set forth in Table 6 of the Sediment Removal and Restoration Plan (as revised in Appendix C hereto), Defendants shall

provide the United States with written notice, at the addresses specified in Section IX of this Consent Decree, of whether or not that task has been completed. If entry of this Consent Decree occurs after the deadline for any task, then Defendants shall provide the notice required by this provision within 15 days after such entry.

24. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

25. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendants shall, by signature of the Trustee or at least one Defendant, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments are, to the best of my knowledge and belief, formed after reasonable inquiry, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

#### VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

26. The Trustee shall preserve and retain all records and documents now in his possession or control or which come into his possession or control that relate in any manner to the performance of the tasks in the Sediment Removal and Restoration Plan for 1 year after termination of this Consent Decree. Within 15 days following that one year period, the Trustee shall transfer all the records referenced in the preceding sentence to Defendants Frederic M. Bernstein; Henry Y. Yusem; and ICR, LLC. Defendants Frederic M. Bernstein; Henry Y. Yusem; and ICR, LLC shall, until 5 years after the termination of this Consent Decree, preserve

and retain all records and documents in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in the Sediment Removal and Restoration Plan, regardless of any corporate retention policy to the contrary. Until 5 years after termination of this Consent Decree, Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in the Sediment Removal and Restoration Plan.

27. At the conclusion of the document retention period, Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Defendants shall deliver any such records or documents to EPA. The Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

28. A. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Defendants' premises to:

- 1) Monitor the activities required by this Consent Decree;
- 2) Verify any data or information submitted to the United States;
- 3) Obtain samples;
- 4) Inspect and evaluate Defendants' restoration and/or mitigation activities; and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law.

## VI. DISPUTE RESOLUTION

29. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations

period, which will be determined from the time the United States notifies Defendants, as provided by this Consent Decree, of the end of informal negotiations, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

30. If the United States believes that a delay would pose an irreparable threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

31. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Paragraph 39 below regarding payment of stipulated penalties.

## VII. FORCE MAJEURE

32. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site (except as provided in paragraph 7 above), or failure to obtain federal, state or local permits (unless the failure to obtain a federal permit is due to the negligence of a federal agency, and Defendants had notified EPA promptly of any perceived negligence).

33. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section IX. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and

- D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

34. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

35. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VI of this Consent Decree.

36. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have been reasonably foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

### VIII. STIPULATED PENALTIES

37. After entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree, including those of the Sediment Removal and Restoration Plan, the Defendants shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- |    |   |                     |
|----|---|---------------------|
| A. | For Day 1 up to and including<br>Day 30 of non-compliance | \$ 500.00 per day   |
| B. | For Day 31 up to and including<br>60 of non-compliance    | \$ 1,000.00 per day |
| C. | For Day 61 and beyond<br>of non-compliance                | \$ 1,500.00 per day |

The Trustee's share of a stipulated penalty shall not exceed \$ 500.00 per day up to and including day 60 of noncompliance, and shall not exceed \$ 1,000.00 per day for day 61 and beyond of noncompliance. Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

38. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VI and/or the Force Majeure provisions in Section VII shall be resolved upon motion to this Court as provided in Paragraphs 29 and 30.

39. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall

continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

40. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 32 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

41. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

42. Defendants shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2004V00991, EPA Region 8 and the DOJ case number 90-5-1-1-16840. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Colorado. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section IX of this Decree.

## IX. ADDRESSES

43. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Marc Weiner  
Enforcement Attorney  
United States Environmental Protection Agency  
Region 8  
999 18<sup>th</sup> Street, Suite 300  
Mail Code 8EN-6  
Denver, CO 80202-2466
- (2) Kenneth Champagne  
United States Environmental Protection Agency  
Region 8  
999 18<sup>th</sup> Street, Suite 300  
Mail Code 8EN-6  
Denver, CO 80202-2466  
(303) 312-6608 (p)

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Andrew J. Doyle, Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-4427 (p)  
(202) 514-8865 (f)

C. TO DEFENDANTS:

- (1) To Defendant Frederic M. Bernstein:  
  
Frederic Bernstein  
P.O. Box 627

Stuart, FL 34995

Phillip C. Gans, Esq.  
Phillip C. Gans, P.C.  
2600 Colorado State Bank Building  
1600 Broadway  
Denver, CO 80202-4989  
Phone: 303-830-8388 / Fax: 303-863-8103

(2) To Defendant Henry Y. Yusem:

Henry Yusem  
7393 Oranewood Lane  
Boca Raton, FL 33433

F. Kelly Smith, Esq.  
Law Office of F. Kelly Smith  
216 16th Street, Suite 1210  
Denver, CO 80202  
Fax: 303-592-1701

(3) To Defendants K&J Properties, Inc.; Y&B Properties, Inc.; and Indian Creek Investments, LLC:

Daniel A. Hepner, Trustee  
Lirtzman, Nehls & Hepner  
190 Arapahoe Ave.  
Boulder, CO 80302-5819  
Phone: (303) 444-5141 / Fax: 303-444-9253

Eugene F. Megyesy, Jr., Esq.  
Dufford & Brown, P.C.  
1700 Broadway  
Suite 2100  
Denver, CO 80290-2101  
(303) 861-8013 (p) / (303) 382-3804 (f)

(4) To Defendant ICR, LLC:

Frederic Bernstein  
P.O. Box 627

Stuart, FL 34995

Henry Yusem  
7393 Orangewood Lane  
Boca Raton, FL 33433

#### X. COSTS OF SUIT

44. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action.

#### XI. PUBLIC COMMENT

45. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the Bankruptcy Court approval is not granted or such approval is judicially overturned or nullified, or unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree. The Trustee will support the appropriateness of this Consent Decree before the Bankruptcy Court or any reviewing court.

## XII. CONTINUING JURISDICTION OF THE COURT

46. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

## XIII. MODIFICATION

47. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any material modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court. Non-material modifications to this Consent Decree may be made only upon written agreement of the parties which shall be filed with the Court. Should the parties disagree on whether a given modification is material or not, the parties shall treat such modification as a material one.

## XIV. TERMINATION

48. Except for Paragraphs 9 and 21, this Consent Decree may be terminated by either of the following:

A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendants may make a unilateral motion to the Court to terminate this Decree after three years from the date of entry when each of the following has occurred:

1. Defendants have obtained and maintained compliance with all provisions of this Consent Decree, including the Sediment Removal and Restoration Plan;
2. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;
3. Defendant's have certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and
4. within forty-five (45) days of receiving such certification from the Defendants, Plaintiff has not contested in writing that such compliance has been achieved. If EPA disputes Defendant's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

IT IS SO ORDERED.

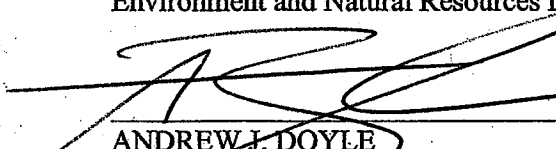
Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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United States District Judge

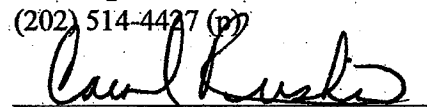
ON BEHALF OF THE UNITED STATES:

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division



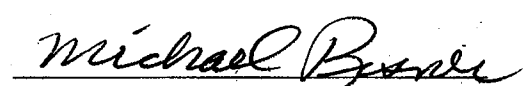
ANDREW J. DOYLE  
United States Department of Justice  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 514-4427 (p)

Dated: 2/9/05



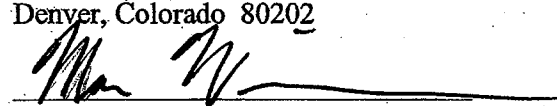
CAROL RUSHIN  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice  
U.S. Environmental Protection Agency, Region VIII  
999 18th Street  
Denver, Colorado 80202

Dated: 2/2/2005



MICHAEL RISNER  
Director, Legal Enforcement Program  
Office of Enforcement, Compliance  
and Environmental Justice  
U.S. Environmental Protection Agency, Region VIII  
999 18th Street  
Denver, Colorado 80202

Dated: 2/2/05



MARC WEINER, Enforcement Attorney  
Office of Enforcement, Compliance  
and Environmental Justice  
U.S. Environmental Protection Agency, Region VIII  
999 18th Street  
Denver, Colorado 80202

Dated: January 31<sup>st</sup>, 2005

ON BEHALF OF DEFENDANT FREDERIC M. BERNSTEIN:



Dated: Feb 1, 2008

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Phillip C. Gans, Esq.  
Phillip C. Gans, P.C.  
2600 Colorado State Bank Building  
1600 Broadway  
Denver, CO 80202-4989  
Phone: 303-830-8388  
Fax: 303-863-8103

ON BEHALF OF DEFENDANT HENRY Y. YUSEM:



Dated: 2/4/08

F. Kelly Smith, Esq.

Law Office of F. Kelly Smith

216 16th Street, Suite 1210

Denver, CO 80202

Phone: 303-592-1652

Fax: 303-592-1701

ON BEHALF OF DEFENDANT K&J PROPERTIES, INC.:

Daniel A. Hepner, Chapter 11 Trustee

Daniel A. Hepner, Trustee  
Lirtzman, Nehls & Hepner  
190 Arapahoe Ave.  
Boulder, CO 80302-5819  
Phone: (303) 444-5141  
Fax: 303-444-9253

Dated: January 14, 2005

ON BEHALF OF DEFENDANT Y&B PROPERTIES, INC.:

Daniel A. Hepner, Chapter 11 Trustee

Daniel A. Hepner, Trustee  
Lirtzman, Nehls & Hepner  
190 Arapahoe Ave.  
Boulder, CO 80302-5819  
Phone: (303) 444-5141  
Fax: 303-444-9253

Dated: January 14, 2005

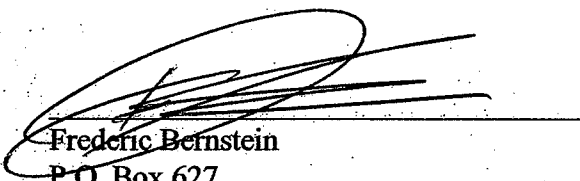
ON BEHALF OF DEFENDANT INDIAN CREEK INVESTMENTS, LLC:

*Daniel A. Hepner, Chapter 11 Trustee*

Daniel A. Hepner, Trustee  
Lirtzman, Nehls & Hepner  
190 Arapahoe Ave.  
Boulder, CO 80302-5819  
Phone: (303) 444-5141  
Fax: 303-444-9253

Dated: *January 14, 2005*

ON BEHALF OF DEFENDANT ICR, LLC:



Frederic Bernstein  
P.O. Box 627  
Stuart, FL 34995

Dated: 2/01/05

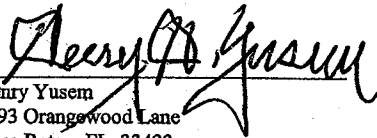
Henry Yusem  
7393 Oranewood Lane  
Boca Raton, FL 33433

Dated: \_\_\_\_\_

ON BEHALF OF DEFENDANT ICR, LLC:

\_\_\_\_\_  
Frederic Bernstein  
P.O. Box 627  
Stuart, FL 34995

Dated: \_\_\_\_\_

  
\_\_\_\_\_  
Henry Yusem  
7393 Orangewood Lane  
Boca Raton, FL 33433

Dated: 1/27/05

# Appendices A through C

are available  
for inspection at  
U.S. District Court  
in Denver, CO.,  
or upon request to  
Andrew J. Doyle  
202-514-4427

[andrew.doyle@usdoj.gov](mailto:andrew.doyle@usdoj.gov)